United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

76-1253 76-1258

United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

FRED STEINBERG,

Defendant-Appellant.

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC, ON BEHALF OF DEFENDANT-APPELLANT FRED STEINBERG

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Docket Nos. 76-1253 and
76-1258

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

FRED STEINBERG, the defendant-appellant presents this his petitio for a rehearing en banc and reargument pursuant to Rule 35 and Rule 40 F.R. App. P., of this Court's decision filed March 7, 1977, affirming (2-1) defendant-appellant's conviction on one count of conspiracy to

bribe officers of the U. S. Immigration and Naturalization Service and six counts of aiding and abetting the bribery of such officers. In support of this petition, petitioner respectfully shows:

1. The petitioner is a person affected by the order of this court.

2. This petition is timely filed.

3. The majority opinion was written by Circuit Judge Lumbard and was joined in by District Judge Bonsal (of the Southern District of New York) sitting by designation.

4. Circuit Judge Van Graafeiland in a separate opinion, dissented.

5. In the opinion of the petitioner, the majority opinion overlooked or misapprehended numerous questions of law and fact which are more specifically stated herein under POINTS I, II, III

6. It is therefore petitioner's contention that a rehearing en banc pursuant to Rule 35 and Rule 40 F.R. App. P. is proper.

POINT I

THE MAJORITY OPINION OVERLOOKED OR MISAPPREHENDED THE FACTS AS ADDUCEDBY THE EVIDENCE.

At the very beginning of the majority opinion, there is a clear misstatement of the facts as adduced by the testimony. The majority begins by summarizing Agent Volpe's testimony as to the March 19, 1975 incident. The court's summation is as follows:

> He asked Volpe whether Volpe could overlook some of the illegal aliens, whether they could notify him in advance of future raids. Steinberg also bragged that he had an illicit parking arrangement with city officials. (emphasis added) (Sl. Op., 2391)

Agent Volpe's testimony as to this conversation differs from the majority's interpretation. In response to the government's question as to the nature of this conversation, Volpe explained that he told his supervisor, Mr. Coffee,

> Q. What was your conversation with Mr. Coffee?
> A. I explained to Mr. Coffee what had just happened out in the field, how I had met an individual and this fellow told me that he wanted to work something out; that he only wanted me to take some of his help and leave most of it behind and also that Fred said to me that the Lindsay administration has been bought and the police were taken care of. (T. 103 emphasis added)

The majority opinion overlooked three important points relating to this discussion. In the first instance, it appears that the majority believed that Steinberg had bragged that he had an illicit arrangement with present city officials. The statement attributed to Steinberg in no

way supports this proposition. At best it appears that in 1975 (when Abraham Beame was already Mayor, a fact not contested by the government) a statement is made that the prior administration to wit: the Lindsay administration had been bought. The record contains no mention as to who is alleged to have bought off the prior administration. Nevertheless, the majority concluded that Fred Steinberg, a mere employee, was responsible for paying off the Lindsay administration. This was construed by the majority to demonstrate Fred Steinberg's criminal propensity.

The majority further overlooked the fact that Volpe upon cross-examination admitted that Steinberg had not offered him anything (TR 490) and further, and perhaps more important in this context, many other businessmen had made the same request and that it was not unusual (TR 491, 492). Volpe further admitted on cross-examination that at the close of this conversation, he, Volpe, believed Steinberg to be a decent, honest, young man. (TR 489). It is clear that the majority either overlooked these important portions of the testimony or misconstrued them as no mention is made in the majority opinion.

The majority goes on to relate the March 31, 1975 conversation. The majority's summation of this is as follows:

> Steinberg then asked Agent Volpe not to arrest his girlfriend, who was one of the illegal aliens at the restaurant. Agent Volpe agreed and wrote out a pass to protect Steinberg's girlfriend from any future arrests. This summary differs from the testimony.

Volpe testified as follows:

> Mr. Steinberg said to us then what he was really afraid of about Immigration was that his girlfriend was here illegally in this country and that if we would do something for her, so that she wouldn't get picked up and sent back to Thailand--I said it is possible that we could give the girl a pass to come into our office at a later date... I wrote out a business card for Mr. Steinberg to give to his girlfriend, whom I had never met... We put my name on it, Mr. Moskowitz' name and phone number and that she was passed in for a later date. (TR 110)

The majority apparently overlooked the fact that Volpe continued his testimony relative to the pass and stated that it was a

> common practice in our service so as not to have to lock somebody up who has not really violated any major laws (TR 113).
>
> We do give them out occasionally in the field who necessitate having them so they will be able to come in and visit us at our office at a later date and they will not be inconvenienced at a later time coming to our office and possibly even being locked up (TR 113).

Volpe further testified that this pass was common department practice and wholly within regulations (TR 114, 115, 507).

The majority goes on to say that on April 9, a memorandum was prepared by Volpe detailing this conversation. The majority, however, overlooks important testimony relative to that memorandum. The memorandum is entitled "ATTEMPTING TO GAIN IMMIGRATION BENEFITS BY OFFERING A BRIBE TO A SERVICE OFFICER"(Def. Riese's Ex. A, TR 510). When questioned about the title of this memo, Volpe clearly admitted that no bribe had been offered and that he was instructed by his supervisor to use that title.

> Q. Did Mr. Steinberg offer you a bribe on either the 19th of March or the 31st of March?
>
> A. No, Sir.
>
> Q. Why did you put it on this paper?
>
> A. That is what I was instructed by my supervisor.
>
> (emphasis added TR 511)

The fact that at this point, no bribe had been offered is clearly relevant and was overlooked by the majority.

In relating the facts of the May 6 meeting, the majority overlooked the fact that it was Volpe who went to meet Steinberg, at the direction of his superiors and an Assistant United States Attorney, for the sole purpose of having someone offer him a bribe. In fact, Volpe's own testimony showed that his supervisor suggested that if this meeting were set up, someone might offer them a bribe. (TR 522) The

majority has wholly failed to take this into consideration and further failed to take into consideration the instructions given Volpe by FBI Agent McCormack and U.S. Attorney Jaffee, to "play a crooked cop" (TR 586) and "if its possible see if he is going to offer you money" (TR 530). All of these instructions were given before anyone had offered a bribe. The majority further overlooks the fact that Steinberg and Riese were selected for this special treatment where other businessmen who had made the same suggestion were not, simply because this was a chain and not a single proprietorship. (TR 533)

The majority predicates its claim that Steinberg was predisposed to commit the crime upon what appears to be a misinterpretation of the entire record. The majority states that "From the outset he entreated the agents to work something out." (2198 Sl. OP) Yet, the majority overlooks Volpe's testimony that this was a common request among businessmen, that no bribe had been offered, (TR 491, 492, 511); that Steinberg merely stated that business was badly affected, and most important, that Volpe believed Steinberg to be a decent, honest, young man. (TR 489, 490)

These facts when read with the majority opinion change the entire thrust of the majority's recitation of the facts. Thus, a rehearing pursuant to Rule 35 and Rule 40 F.R. App. Proc. is proper.

POINT II

THE MAJORITY MISAPPREHENDED LAW OF ENTRAPMENT AND OVERREACHING BY A GOVERNMENT AGENT

The facts of this case when put in proper context show that neither the defendant Steinberg nor the defendant Riese were predisposed to commit this crime. There is no evidence of prior criminality as to either defendant. As to defendant Steinberg, his requests to the agents to "work something out" were not taken by them to be serious overtures. If Volpe had taken these statements to be corrupt overtures, would he have stated under oath that immediately after they were made, and when he left the restaurant, he believed Steinberg to be a perfectly decent, honest, young man? (TR 489)

It is undisputed that the defense of entrapment was designed to prevent a defendant who is without criminal purpose or intent from being convicted of a crime which is the product of the government's creation. SORRELLS v. U.S., 287 U.S. 435 (1932), SHERMAN v. U.S. 356 U.S. 369 (1958).

That the majority misapprehended the law as it applies to this case can be seen from the review of the facts in Point I. Defendant Steinberg's actions did not constitute predisposition. In fact, neither

the agent nor his supervisors construed it as such. They merely pursued the matter to "get" top supervisory employees of a large chain. (TR 510, 511, 522, 530, 533, 586)

That the scheme to get someone to offer a bribe was conceived by the government cannot be seriously controverted, in light of the testimony by Volpe, stating that his superiors and an Assistant U.S. Attorney instructed him (prior to the time that any bribe was discussed by anyone in the presence of the defendants) to play a crooked cop so that someone might offer the bribe (TR 522, 586) and the further instructions from Assistant U.S. Attorney Jaffee and FBI Agent McCormack to see if someone would offer them money. (TR 530)

The Court's intention in SORRELLS, supra, and SHERMAN, supra, is that predisposition must be an act of conduct that occurs before a defendant comes under the power of inducement of the government agent. In the case at bar defendant Steinberg's willingness to participate comes about only after the agent's threats against his girlfriend (now Mrs. Fred Steinberg) are made abundantly clear.

Thus, the majority's application of predisposition to Mr. Steinberg appears to be a misapprehension of the law as applied to these facts.

Further, the majority glosses over an important claim by petitioner that the government's conduct in any event was a violation of due process in that there was overreaching by government agents. The areas of fact and law which the majority overlooked or misapprehended are best seen by an examination of the dissenting opinion.

POINT III

THE DISSENTING OPINION SETS FORTH THE FACTUAL BASIS UPON WHICH THE MAJORITY MISAPPREHENDED THE FUNDAMENTAL DUE PROCESS QUESTION BEFORE IT

A key issue which must be considered in this petition is whether a police officer may now be a creator of criminal activity and whether he may be charged by his superiors to entice and provoke criminal conduct where such conduct would in all likelihood never have taken place but for the officer's efforts to induce the crime. The majority, in its misapprehension of the law, has given judicial authority to this type of conduct.

Judge Van Graafeiland, in addressing this issue has stated:

> However, when a law enforcement officer forgets that his job is to apprehend criminals - <u>not to create them</u>, to prevent crime - not to incite it, he merits no words of approbation from any judge. BUTTS v. U.S., 273 F. 35, 38 (8th Cir. 1921) This, I believe is such a case. (Sl. Op. 2201, 2202)
>
> Two eager, young immigration officers, playing at being policement, cozened, wheedled and bedeviled two equally young men, innocent of any previous criminality, into committing unlawful acts from which they stood to gain not one penny for themselves. Although my lone voice cannot repair the harm which has been done, it can express my disapproval of the tactics which have branded these young men with the ineradicable tag of "criminal". (Sl. Op. 2202)

As Judge Van Graafeiland points out, the investigative techniques used by the agents which the majority characterizes as "certainly not improper" included threats to Mr. Steinberg as to what would happen to his girlfriend if he did not cooperate, pressuring Steinberg and Riese (pursuant to their supervisor's instructions) to offer a money bribe, the agent's conversations among themselves to the effect that they were trying to angle the defendants, and their statement after turning over the green card to Steinberg's girlfriend, "They got ripped off." In Judge Van Graafeiland's words:

> This was not investigation, it was instigation; and it sullies the good name of every conscientious law enforcement officer in the country to characterize it as proper. (Sl. Op. 2204)
>
> "I'm trying to angle him." This is a normal investigative technique of a conscientious police officer." (Sl. Op. 2210)
>
> If there was a concert here, the government agents were the conductors, and the defendants responded to their persuasive batons. I cannot vote to affirm a conviction based on such governmental activities, and if I read HAMPTON correctly, I do not believe that a majority of that court would. (Sl. Op. 2213)

There is no doubt that this Circuit frowns on government instigation of crime. U.S. v. ARCHER, 486 F. 2d 670; U.S. v. TOSCANINO, 500 F. 2d 267. This court, in ARCHER has stated that:

> To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face. U.S. v. ARCHER, supra, p. 675.

In U.S. v. TOSCANINO, supra, this court deplored investigative "methods that lead to decreased respect for the law." Supra, p. 274.

Petitioner most respectfully suggests that the majority opinion has misapprehended or overlooked the application of the doctrines enunciated in ARCHER and TOSCANINO to the facts of the case at bar.

SUGGESTION FOR REHEARING EN BANC PURSUANT TO RULE 35

Petitioner respectfully suggests that a rehearing en banc pursuant to Rule 35 F.R. App. P, is proper and required under the circumstances of this case.

Rule 35 enunciates two tests by which to measure whether a matter should be heard en banc. The first test suggests that rehearing may be ordered in order to "secure or maintain uniformity" of the decisions of the Court. Rule 35(a). The second test suggests that rehearing is proper when a "question of exceptional importance" is involved. Rule 35(a).

Petitioner respectfully suggests that the case at bar satisfies both tests. In the first instance, this Court, in U.S. v. ARCHER, supra, and U.S. v. TOSCANINO, supra, rendered decisions which are in conflict with the case at bar. Petitioner most respectfully suggests that had this case been heard by the bench which heard ARCHER (Judges Friendly, Feinberg and Mansfield) the result might well have been different. In the second instance, this case is one of exceptional importance because it enunciates guidelines for the conduct of government agents in the investigatory stage of a prosecution. The guidelines as enunciated by the majority in the case at bar are in conflict with those enunciated by this Court in

ARCHER, supra. The case is of exceptional importance also because this Circuit is here presented with the question of what constitutes governmental misconduct resulting in a denial of due process where entrapment is not established.

For the sake of brevity and to prevent repetition, petitioner Steinberg joins with petitioner Riese in his petition and more specifically with that portion containing petitioner Riese's suggestion for rehearing en banc.

WHEREFORE, petitioner FRED STEINBERG respectfully requests rehearing of the decision of this Court and respectfully suggests that such rehearing be by this Court en banc.

Dated: New York, N. Y.
March 18, 1977

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }
COUNTY OF NEW YORK } *SS.:*

Lucille Landrigan

being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at Brooklyn, NY

That on the 21st *day of* March *1977*

deponent served the within petition for rehearing

upon Shea Gould Climenko & Kramer, Esqs.

attorney(s) for appellant Dennis Riese

in this action, at 330 Madison Avenue, New York, NY 10017

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in – a post office – official depository under the exclusive care and custody of the United States post office department within New York State.

Lucille Landrigan

Lucille Landrigan

Sworn to before me,

this 21 *day of* March *1977*

JOYCE KRUTICK BARLOW
Notary Public, State of New York
No. 31-2211745
Qualified in NY County
Commission Expires March 30, 1979